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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>TERRYANCE ACEY SMITH,<br>Defendant and Appellant. | G040872<br>(Super. Ct. No. FWV035340)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of San Bernardino County, Ingrid Adamson Uhler, Judge. Affirmed as modified.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

Terryance Acey Smith appeals from a judgment after a jury convicted him of numerous offenses arising out of a series of robberies in the summer of 2005. Smith argues he received an unlawful sentence because the use of his prior nonjury juvenile adjudications as strikes under the "Three Strikes" law violated his federal constitutional rights. He also contends the abstract of judgment should be corrected to reflect he was convicted by a *jury* and not *the trial court*. With the exception of his abstract of judgment argument, none of Smith's contentions have merit, and we affirm the judgment as modified.

FACTS

In our nonpublished opinion *People v. Lockhart* (G040889, Dec. 29, 2008), we affirmed Lynn Leroy Lockhart's 31 convictions arising from a crime spree during the summer of 2005. Smith was one of Lockhart's two confederates in that crime spree. Smith was not charged with counts 1 through 3 arising from the July 14, 2005, Shurguard Storage robbery. Because the facts underlying counts 4 through 31 are detailed in that opinion, we will not recite them here. We must, however, discuss the facts underlying counts 32 through 40, the August 2, 2005, robbery of the Recomm Nextel store.

On that day, Elizabeth Rosen, Mary Plascencia, and Richard Petachenko were working at Recomm Wireless in San Bernardino. A little after noon, all three were in the back room when they heard the front door open. Rosen went to the front of the store and saw Smith and another man. As she assisted Smith, the other man left the store and returned with a third man. The two men, one with a handgun, rushed towards the counter, and Smith asked Rosen if she knew what was happening. After Rosen complied with Smith's order to empty the cash from the register, Smith asked her if there was a safe in the back. Despite Rosen's insistence there was nothing in the back room, the men led her there and found Plascencia and Petachenko. The men forced Plascencia, who tried to flee, but was caught, and Petachenko to lay on the ground. One of the men stayed with Plascencia and Petachenko while Smith and the third man took Rosen to the storage

room to relieve the store of its merchandise. The men took money from each of the victims and Plascencia's cellular telephone. The men told the victims not to call the police for 30 minutes because they had their identification cards and "they would come and get us."

In addition to the 28 offenses charged in counts 4 through 31 as detailed in *People v. Lockhart* (G040889, Dec. 29, 2008), the first amended information charged Smith with the following offenses concerning the Recomm Nextel robbery: second degree robbery (Pen. Code, § 211)[1] (count 32), false imprisonment by violence (§ 236) (count 33), dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (count 34), second degree robbery (§ 211) (count 35), false imprisonment by violence (§ 236) (count 36), dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (count 37), second degree robbery (§ 211) (count 38), false imprisonment by violence (§ 236) (count 39), dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (count 40).

As to all the counts, the first amended information alleged a principal in the offense was armed with a firearm within the meaning of section 12022, subdivision (a)(1). The first amended information also alleged Smith suffered four prior convictions in Sacramento County Superior Court case No. Y69140 in April 1995 (§§ 1170.12, subds. (a)-(d)(1), 667, subds. (b)-(i)).

Smith testified on his own behalf and denied committing any of the robberies. He also offered the testimony of an expert witness who explained among other things the affect stress and trauma have on a witness's ability to recall details of an event.

The jury acquitted Smith of counts 4 through 7, but convicted him of the remaining counts. The jury found true the firearm allegations as to each count. At a bench trial, the trial court found Smith had suffered four prior convictions.

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[1] All further statutory references are to the Penal Code.

The trial court sentenced Smith to consecutive 25 years to life terms on 15 of the counts for a total term of 375 years to life. The court also sentenced him to a determinate term of five years and eight months on the corresponding firearm allegations.

DISCUSSION

*I. Nonjury juvenile adjudications*

Relying on *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187 (*Tighe*), Smith contends use of his prior nonjury juvenile adjudications violates his federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments. We disagree.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 468-469, the United States Supreme Court examined the constitutionality of a New Jersey hate crime statute that provided for an extended term of imprisonment if the trial judge found, by a preponderance of the evidence, the defendant committed the crime with the purpose of intimidating a group or individual "'because of race, color, gender, handicap, religion, sexual orientation[,] or ethnicity.'" The Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.)

In *Tighe*, a divided panel of the Ninth Circuit Court of Appeals determined the prior conviction exception announced in *Apprendi* "must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi's* 'prior conviction' exception.'" (*Tighe, supra*, 266 F.3d at p. 1194, fn. omitted.)

In *McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545, the United States Supreme Court held due process did not require a jury trial in juvenile proceedings. The Court explained that because a juvenile court may constitutionally and reliably adjudicate

a delinquency matter without providing the minor a jury trial, it follows there is no constitutional impediment to the subsequent use of the juvenile adjudication to enhance an adult offender's sentence.

As the dissent in *Tighe* explained: "Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime. For adults, this would indeed include the right to a jury trial. For juveniles, it does not. [W]hen a juvenile receives all the process constitutionally due at the juvenile stage, there is no *constitutional* problem (on which *Apprendi* focused) in using that adjudication to support a later sentencing enhancement." (*Tighe, supra,* 266 F.3d at p. 1200 (dis. opn. of Brunetti, J.).)

Every California appellate court and every federal appellate court besides the Ninth Circuit has rejected the reasoning of the *Tighe* majority. (*People v. Buchanan* (2006) 143 Cal.App.4th 139, 149; *People v. Palmer* (2006) 142 Cal.App.4th 724, 733; *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 830-831; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1314-1316; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079; *People v. Bowden* (2002) 102 Cal.App.4th 387, 393-394; *United States v. Burge* (11th Cir. 2005) 407 F.3d 1183, 1190; *United States v. Jones* (3rd Cir. 2003) 332 F.3d 688, 696; *United States v. Smalley* (8th Cir. 2002) 294 F.3d 1030, 1032.)

We find these cases persuasive. Because juvenile adjudications are fully consistent with constitutional principles and sufficiently reliable for juvenile court purposes, even in the absence of the right to a jury trial, we see no reason to preclude their use by trial courts in enhancing an adult criminal defendant's sentence.

Finally, Smith claims the *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243 (*Almendarez-Torres*), exception to the *Apprendi* rule, i.e., a defendant does not have a federal constitutional right to a jury trial, for sentencing purposes, on

whether the defendant has suffered a prior conviction, is suspect because "four of the current[] seven justices" doubt its validity. Until the Supreme Court of the United States overrules *Almendarez-Torres*, the prior conviction exception is good law. Therefore, the trial court did not violate Smith's right to a jury trial when it imposed an aggravated sentence based on his four juvenile adjudications.

*II. Abstract of judgment*

Smith argues this court should order the abstract of judgment corrected to reflect the *jury* convicted him of counts 8 through 40. The Attorney General agrees. We order the abstract of judgment modified to reflect Smith was convicted by a jury of counts 8 through 40. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186 [court of appeal may correct clerical error in abstract of judgment].)

DISPOSITION

The abstract of judgment is modified to reflect Smith was convicted by a jury of counts 8 through 40. The clerk of the superior court is ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations. We affirm the judgment as modified.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.